The Constitutionality of Section 102(p) of the Consumer Protection Act

Quebec's *Consumer Protection Act*[1] has been welcomed as a progressive "code of consumer rights, fair business conduct and effective redress",[2] which in some aspects surpasses the protective measures already in force in other provinces. Taken as a whole the Act does much to counterbalance the protective, nineteenth century attitude of the Civil Code towards commerce and the *commerçant.*

However, powers conferred on the Lieutenant-Governor in Council under section 102(p) may be so drafted as to exceed the bounds of constitutional authority. The section allows the Lieutenant-Governor in Council to make regulations, "to exempt from the application of this Act all or part of such class of persons, goods or contracts as he indicates". In considering whether or not such a mandate is *ultra vires* the National Assembly, there is no need to examine the content of regulations already made under it; whether or not they conform to the spirit of the Act is immaterial to this argument, since the latter touches only the preliminary granting of such regulatory powers.

> Once it has been ascertained that Parliament has given the Executive a certain power... then it is beyond the power of the Courts to review the manner in which the Executive exercises its discretion. Courts cannot examine policy considerations animating the Executive.[3]

The rules for delegation of power under the Canadian constitution have been laid down in *Hodge* v. *The Queen,*[4] where the *British North America Act* was held to have given provincial legislatures:

> ...authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

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[1] L.Q. 1971, c. 74.

[2] H. Buchwald, 1971 Annual Report of the Canadian Consumer Council.

[3] *Reference re Proclamation of Section 16 of the Criminal Law Amendment Act 1968-69,* (1970) 10 D.L.R. (3d) 699, at p. 711 (*per* Judson,J.).

[4] (1883) 9 App. Cas. 117.

> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.[5]

Provincial power is thus plenary "within the limits prescribed by section 92 . . . limits of subjects and area"; and any power delegated must be "ancillary to legislation", with "the object of carrying the enactment into operation and effect".[6]

Does section 102(p) of the *Consumer Protection Act* observe these two limitations? The question turns on two criteria, both of which must be met:

(1) Can the National Assembly divest itself of such a power without abdicating its legislative functions?; and,

(2) Can such a power be exercised by the Lieutenant-Governor in Council?

The first issue deals with a provincial legislature's capacity to delegate its own legislative powers, while the second concerns the Executive's competence to exercise them.

I. Has the National Assembly Abdicated its Powers?

The contention that section 102(p) of the *Consumer Protection Act* is unconstitutional might be based largely on the findings of the Supreme Court of Alberta in *Crédit Foncier Franco-Canadien* v. *Ross*,[7] and on an analysis of the case by G.S. Rutherford.[8]

The Alberta case considered a provincial statute, *An Act to Provide for the Reduction and Settlement of Certain Indebtedness*,[9] which contained a provision remarkably similar to the one under discussion here: "The Lieutenant-Governor in Council may from time to time declare that any kind or description of debt is a debt to which this Act does not apply . . .". It was held that:

> There seems no doubt that the intended effect of sec. 12 is to confer legislative authority upon the Lieutenant-Governor by which he could by order in council give such a description of debts to be excluded from the operation of the Act . . . as completely to nullify the Act.[10]

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[5] *Ibid.*, at p. 132.

[6] *Ibid.*

[7] [1937] 2 W.W.R. 353 (Alta. Sup. Ct., App. Div.).

[8] *Delegation of Legislative Power to the Lieutenant-Governor in Council*, (1948) 26 Can. Bar Rev. 533.

[9] S.A. 1936, c. 2 (2nd Sess.).

[10] *Crédit Foncier Franco-Canadien* v. *Ross*, [1937] 2 W.W.R. 353, at p. 356.

It was clearly held that the power to exempt from an act is, in fact, the power to legislate since it alters the scope of the intended measures by applying executive exemptions to certain classes of people who would normally be covered by a statute.

> It is apparent that the authority to make regulations in order to make legislation enacted by the Legislature completely effective is a quite different thing from authority to make an independent enactment. That is not ancillary to legislation but is legislation itself.[11]

As Rutherford points out, it may be difficult to draw the line between (non-permissible) legislation and (permissible) ancillary regulations. But it is easy enough, he says, to detect,

> ...as being really legislative in character, regulations that extend or limit the sphere of an act, the kind of regulations for which provision was made in the *Reduction and Settlement of Debts Act* of Alberta.[12]

The Alberta statute is distinguished from the Ontario law discussed in *Hodge*, since in the latter case the Legislature itself wrote into the statute:

> ...a definite exemption which the commissioners could merely bring into effect by a resolution. They could not go outside the four walls of the statute and create exemptions at their own discretion. Under the Alberta statute the Lieutenant-Governor in Council could exclude from the Act 'any kind or description of debt'.[13]

As we have seen the *Consumer Protection Act* resembles the Alberta statute and not the Ontario one. The delegated power, then, is of a legislative character and violates the second of the *Hodge* rules.

The opposing argument, holding section 102(p) of the *Consumer Protection Act* to be *intra vires*, attempts to fit it within the restrictions of the *Hodge* rules. The scope of the Act — protection of consumers — is clearly within provincial jurisdiction under section 92(13) of the *B.N.A. Act*, dealing with property and civil rights within the province. The authority for a delegation of legislative powers is *In re Gray*,[14] which establishes that, "Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government".[15] The Supreme Court of Canada there held valid a delegation under the *War Measures Act* to the Governor-in-Council of:

> ...power to do and authorize such acts and things, and to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem

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[11] *Ibid.*, at p. 358.
[12] (1948) 26 Can. Bar Rev. 533, at p. 543.
[13] *Ibid.*, at p. 541.
[14] (1919) 57 S.C.R. 150.
[15] *Ibid.*, at p. 157.

> necessary or advisable for the security, defence, peace, order and welfare of Canada ...,

together with a list of enumerated areas in which he could make such orders. But it added that the Act was framed "providing for a very great emergency",[16] namely World War I, which Canada entered as a result of "... the most significant, indeed the most revolutionary decision in the history of the country".[17]

The judgment in *Re Natural Products Marketing (B.C.) Act*[18] makes it clear that in *Gray* there was the exercise of the federal Parliament's powers under the "Peace, Order and Good Government" clause, and it was restricted by a time limit, i.e., duration of the war. Limitations on time and scope are considered vital to the constitutionality of such delegation; indeed, in *R.* v. *Halliday*,[19] all kinds of express restrictions in the *Defence of the Realm Act* were held insufficient to guard against "poison to the commonwealth". But the wording of section 102(p) of the *Consumer Protection Act* carries absolutely no restrictions of time, scope or anything else: nothing in it prevents the Lieutenant-Governor in Council from exempting blue-eyed people or (closer to the spirit of the Act but just as arbitrarily) homeowners. Proposed exemptions are to be submitted to the Consumer Protection Council, but this is an advisory body only and its members are appointed by the Lieutenant-Governor in Council.[20]

II. Can the Lieutenant-Governor Exercise this Legislative Power?

The functions of the Lieutenant-Governor, as defined by sections 55 and 90 of the *B.N.A. Act*, are threefold: to assent to legislation, to withhold assent, or to reserve it for the Queen's pleasure. Other administrative functions may be allotted to him by the legislature, but not legislative ones since to give wider legislative powers than those spelled out in the *B.N.A. Act* is "affecting the office of the Lieutenant-Governor" and is expressly prohibited by section 92(1). That is the interpretation to be drawn from the *B.C. Natural Products* case as well as *Shannon* v. *Lower Mainland Dairy Products Bd.*[21] The Privy Council held that a legislature could delegate to the Lieutenant-Governor in Council so long as it was

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[16] *Ibid.*
[17] *Ibid.*, at p. 169.
[18] [1937] 4 D.L.R. 298.
[19] [1917] A.C. 260, at p. 292.
[20] *Vide*, ss. 85 and 86.
[21] [1938] 2 W.W.R. 604 (P.C.).

"dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers". The delegation provided by the B.C. statute was held valid because it was properly restricted. The Lieutenant-Governor in Council could "establish, amend, and revoke schemes for the control and regulation within the province of the transportation, packing, storage, and marketing of any natural products". "Natural products" were clearly defined within the body of the statute; in addition, exemption powers were spelled out in great detail and could not be applied to the Act in general but only to "any determination or order". Thus, the Lieutenant-Governor in Council had no discretion to amend the Act by altering its scope.

In *Crédit Foncier*, however, the statute used language similar to that of the *Consumer Protection Act*, language so sparse as to form what Macdonald, J. would have called, in another context, "... merely a skeleton Act without any substantive statement of policy or intent".[22] The Alberta statute was held to contravene section 92(1) of the *B.N.A. Act* on the following grounds:

> No doubt the Lieutenant-Governor is an integral part of the Legislature but his function is not to initiate or to enact legislation but merely to authorize the introduction to the Legislative Assembly of certain classes of legislation and to assent to or withhold assent from legislation proposed by the Legislative Assembly. What is intended by sec. 12 is to confer a quite different function from any of those recognized by the Constitution. This question was considered in *In re The Initiative and Referendum Act* ([1919] A.C. 935 ...) in which it was held throughout that Legislation providing for the enactment of laws without the assent of the Lieutenant-Governor was not within the competence of a provincial Legislature, as being an interference with the office of the Lieutenant-Governor. This case is different only in that it adds to rather than subtracts from the Lieutenant-Governor's functions. That difference is in my opinion of no importance. In *Lefroy's Canada's Federal System*, at p. 387, is a note giving the opinion of Sir John Thompson, Minister of Justice, in pursuance of which an Act of the Quebec Legislature declaring the Lieutenant-Governor a corporation sole was disallowed. His opinion was that:
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> > It is immaterial whether a Legislature by an Act seeks to add to or take from the rights, powers or authorities which by virtue of his office a Lieutenant-Governor exercises, in either case it is legislation respecting his office.[23]

There is an argument to be made that adding to the powers of the Lieutenant-Governor is not the same as subtracting from them, and that only additions are proper. It was so held in one old case,

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[22] *Re Natural Products Marketing (B.C.) Act*, [1937] 4 D.L.R. 298, at p. 317.

[23] *Crédit Foncier Franco-Canadien* v. *Ross*, [1937] 2 W.W.R. 353, at p. 357.

A.-G. Can. v. *A.-G. Ont.*,[24] but only in the court of first instance. In the Supreme Court, the majority of the judges sought refuge in the precautionary wording of the statute in question; the only judge who dealt with the addition of powers held it unconstitutional. To hold that only additions are proper leads to a logical absurdity, since if a legislature may add powers to the Lieutenant-Governor but not subtract them, it can never revoke powers which it has once delegated. Yet, one of the arguments raised against such delegation being an abdication of powers was that the legislature retained control through its power to revoke. In the *Chemical Reference* case,[25] Duff, C.J. said: "... the final responsibility for the acts of the executive rest upon Parliament. Parliament abandons none of its powers, none of its control over the executive, legal or constitutional."[26] However, Rand, J. noted in *A.-G. N.S.* v. *A.-G. Can.*:

> ... the danger ... of prescriptive claims based on conditions and relations established in reliance on the delegation. Possession here as elsewhere would be nine points of law and disruptive controversy might easily result. The power of revocation might in fact become no more feasible, practically, than amendment of the Act of 1867 of its own volition by the British Parliament.[27]

To use the *Chemical Reference* case or any other case dealing with the *War Measures Act* is to assume, moreover, that the Dominion Parliament and the provincial legislatures have identical powers of delegation under the *B.N.A Act*. This is not so. Section 91 confers on the federal Parliament a residuary power to legislate for the "Peace, Order and Good Government of Canada" which has no provincial counterpart in section 92. Furthermore, section 92 contains a prohibition on "matters affecting the office of the Lieutenant-Governor" which is not duplicated in section 91. These are two important differences in "subject and area" which push enactments such as section 102(p) of the *Consumer Protection Act* beyond the limits of what is constitutionally permitted. Thus, the first *Hodge* rule is violated.

It follows, therefore, that provincial legislatures could not revoke the Lieutenant-Governor's powers under section 92(1) of the *B.N.A. Act*, even if a revoking power were held to exist independently of the delegating power to which it is the counterpart.

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[24] (1891) 20 O.R. 222.

[25] [1943] S.C.R. 1.

[26] *Ibid.*, at p. 12.

[27] [1951] S.C.R. 31, at p. 50.

Conclusion

This defect in the *Consumer Protection Act* could be corrected with proper re-drafting. Recommendations have been made recently by two committees which studied the form of subordinate legislation: the Special Committee on Statutory Instruments (MacGuigan Committee), 1969, and the Ontario Royal Commission Inquiry into Civil Rights (McRuer Commission), 1968.

The federal committee, dismayed at hearing widespread complaints of uncertainty in federal legislation, recommended that "the precise limits of the law-making powers which Parliament intends to confer should be defined in clear language".[28]

The McRuer Report cited examples from Ontario legislation; the broadest acceptable terms for delegation gave the Lieutenant-Governor power to regulate "respecting any matter necessary or advisable to carry out the intent and purpose of this Act".[29] Such phrasing was approved by the Supreme Court of Canada in the *Reference re Natural Products Marketing (B.C.) Act*.[30]

But the *Consumer Protection Act* contains no general statement of its "intent and purpose". There is no preamble to the Act; nor is there any direction to the Lieutenant-Governor in Council of the scope of his powers, since section 102 states only that "the Lieutenant-Governor in Council may make regulations . . .". He is not confined to matters necessary or advisable for carrying out the Act.

Power to exempt is deemed the equivalent of power to amend and "the delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be found in the Statute book".[31] The MacGuigan Committee recommended that "there should be no authority to amend statutes by regulation" and specifically included "the exemption of something which would otherwise be covered by the act".[32] It cites the reasoning of the McRuer Report:

> Such delegation of legislative power provokes the comment that the Legislature was not sure what it meant so to avoid making up its mind it delegated the power to decide to another body . . . Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action . . . The rule should be that the normal constitu-

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[28] MacGuigan Report, (October, 1969), at p. 33.

[29] McRuer Report, at p. 341.

[30] [1937] 4 D.L.R. 298.

[31] E. Driedger, *Legislative Forms and Precedents*, (Queen's Printer, Ottawa: 1963), at p. 48.

[32] MacGuigan Report, *op. cit.*, at pp. 37-38.

tional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.[33]

It is suggested, therefore, that the *Consumer Protection Act* be re-drafted to include a proper "intent" clause and a more detailed limitation of the delegated power; it must be made clear that the exemption clause of section 102(p) is to be applied only within the general purpose of the Act, and should not be used to deprive consumers of the general safeguards provided for their benefit.

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[33] McRuer Report, *op. cit.*, at p. 348.

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